In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1393

STANDARD FRUIT AND STEAMSHIP COMPANY, PETITIONER

v.

UNITED FRUIT COMPANY AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15–23) is not yet reported. The district court rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1969. The petition for a writ of certiorari was filed on May 14, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioner access to detailed plans for dives-

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titure filed by its competitor in compliance with a consent decree in a government antitrust case.

STATEMENT

In 1954 the United States instituted a civil antitrust action against the United Fruit Company ("United"), the largest importer of bananas for the domestic market. After extensive discovery and pretrial proceedings, the case was terminated by a consent judgment (A43–A69) [1] which, among other things, requires United to create out of United's assets a new competitive company and to submit for the district court's approval a plan therefor (A60–A64). Shortly after entry of the decree, at United's request and over the government's objection, the district court entered a protective order (A69–A71). The order provides that, without an express order of the court, third parties may not inspect or copy any document submitted and filed with the clerk of the district court by either party to the litigation.

The district court on July 28, 1967 approved United's plan for the creation of a new company (A71–A73). The plan requires United to submit to the district court, within one year after approval of the plan, "a detailed program for the initial organization, staffing, production, shipping, marketing, and other arrangements" for the new company; to submit within two years of approval "a detailed program showing the shipping arrangements, terminal arrangements, liquid assets and other essential acces-

[1] "A ——" refers to the Appendix to the Briefs in the court of appeals, which petitioner has filed in this Court.

sory assets that have been transformed or will be offered to the New Company"; and to submit, commencing within 60 days of approval, bimonthly reports setting forth in detail the action taken during the previous 60 days to comply with the plan, the programs and the decree.

Petitioner Standard Fruit and Steamship Company ("Standard") is the second largest banana importer in the United States (A75) and will be a direct competitor of the new company. In July 1968, Standard filed in the district court a motion seeking permission to inspect and copy the programs and reports submitted by United and any other portion of the record (A73–A77). The district court denied the motion but without prejudice to Standard's or the government's right to make the same or a similar motion thereafter.

The court of appeals unanimously affirmed.[2] It held that a district court has inherent power to enter protective orders necessary to effectuate its judgment (Pet. App. 19–21), and that the court had not abused

[2] The court held that it had jurisdiction to review the district court's order under 28 U.S.C. 1291, and that the order was sufficiently final because "it denied the relief sought irrespective of the fact that the order denied [Standard's] motion without prejudice to renew it at a later time" (Pet. App. 19).

In addition to filing a notice of appeal to the court of appeals, Standard also had appealed directly to this Court under Section 2 of the Expediting Act (15 U.S.C. 29) and had sought from this Court a writ of mandamus. This Court dismissed the appeal for want of jurisdiction (*Standard Fruit & Steamship Co.* v. *United Fruit Co.*, 393 U.S. 406) and denied leave to file the petition for mandamus (*Standard Fruit & Steamship Co.* v. *Lynne*, 393 U.S. 974).

its discretion in denying Standard's motion. In view of the district judge's "detailed knowledge of the record and complexities and peculiarities of the banana industry gleaned from his more than twelve years of conscientious supervision of this case," the court of appeals concluded that the district judge was "particularly well qualified to determine whether disclosure would impose disadvantages inimical to the purposes of the Final Judgment" (Pet. App. 22–23). More particularly, the court ruled that the district judge's discretion "was in fact exercised wisely given the likely effects which misuse of the detailed and sensitive information could have" (Pet. App. 23, footnote omitted).

ARGUMENT

In the district court the United States supported Standard's motion, urging that generally plans and reports filed in antitrust divestiture proceedings should be open for public inspection so that the court and the government may have the benefit of the informed judgment of interested persons as to the adequacy of the steps being taken to effectuate the decree. In the court of appeals, however, the government took the position that the decision whether to grant Standard access to United's plans and reports was within the discretion of the district court, and that the latter had not abused its discretion in denying access. We adhere to that position here; and we submit that the question whether the district court here abused its discretion, turning as it does upon

the particular facts of this case, does not warrant further review.

In addition to the express authority a district court has under the Federal Rules of Civil Procedure to provide confidential treatment for information obtained in discovery proceedings,[3] it also has inherent power, in order to prevent duress, oppression or injustices in cases before it, to provide such treatment for other material submitted to it. *International Products Corp.* v. *Koons*, 325 F. 2d 403, 407–408 (C.A. 2). As the court of appeals held here, this power authorizes those protective orders that are necessary to implement antitrust decrees. Neither the general policy in this country that judicial proceedings should be open to the public nor the Publicity in Taking Evidence Act, 15 U.S.C. 30,[4] precludes a district court from keeping particular information confidential when the circumstances require it.

Once the existence of this general power is recognized, the decision whether or not to exercise such power in a particular case or to except particular documents or particular individuals from the coverage of a secrecy order necessarily lies within the in-

[3] See F.R. Civ. P. 30(b) (depositions), 31(d) and 33 (interrogatories), 34 (discovery and production of documents), and 45(d) (subpoenas for taking depositions); *A. H. Robins Co.* v. *Fadely*, 299 F. 2d 557, 561–562 (C.A. 5).

[4] 15 U.S.C. 30 provides that in certain antitrust actions the taking of depositions "shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable."

formed discretion of the district judge to whom the case is assigned. In the present case, as the court of appeals pointed out (Pet. App. 22–23), the district judge was "particularly well qualified" to make that determination since "his more than twelve years of conscientious supervision of this case" enabled him "to determine whether disclosure would impose disadvantages inimical to the purpose of the Final Judgment."

In deciding to maintain secrecy in this case, the district court had to consider competing considerations. On the one hand was the fact that Standard did not seek the information for use in other litigation—which was the situation in *Olympic Refining Co.* v. *Carter*, 332 F. 2d 260, 264–266 (C.A. 9), certiorari denied, 379 U.S. 900, in which disclosure was ordered and which the court below recognized (Pet. App. 21–22) would present a different case. Rather, Standard sought it primarily to aid it in competing with a new firm and to prevent United Fruit from allegedly "raid[ing] Standard's organization" to staff the new company (A. 75). Moreover, as the court of appeals recognized (Pet. App. 23 & n. 11), the district court had before it an affidavit of the president of the new company reciting numerous examples of the harm to that company which could result if the information sought in this case were disclosed to its competitors. On the other hand were the facts that United, which will also be a competitor of the new company, necessarily has an intimate knowledge of its affairs not possessed by Standard, and the benefits that would re-

sult by permitting the industry to bring to the attention of the court and the government any competitive problems the programs and reports might disclose.

Although the government believed that the latter considerations outweighed the former, and therefore urged the district court to order disclosure, the weighing of these considerations was within the court's discretion, and the district court did not abuse its authority in refusing disclosure. In any event, the court of appeals upheld the trial court's exercise of discretion, and there is no occasion for review by this Court of a ruling that thus turns upon the facts of the particular case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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